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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMONT JOHNSON,

Defendant and Appellant.

B249922

(Los Angeles County Super. Ct.
No. KA080251)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor D. Martinez, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Lamont Johnson of two counts of residential burglary in violation of Penal Code section 459.¹ Defendant appeals from the judgment, arguing that the unjustified delay between the filing of the complaint on August 29, 2007, and his arraignment on January 5, 2012, caused prejudice and violated his speedy trial and due process rights. For the reasons below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Count 1 (Claremont Burglary)

On January 27, 2007, Christopher and Mary Caenepeel returned to their residence to find that it had been burglarized. The door was kicked in and items were missing from the home, including a telephone answering system, laptop computer, printer, and sound system. Other than a neighbor, the Caenepeels had not given permission to anyone to enter their residence.

Officer David Hardin of the City of Claremont Police Department lifted fingerprints from a coffee cup found on the living room floor. Latent print examiner Frank Terrio compared the fingerprints lifted from the coffee cup to a known 10-print card from defendant. Two of the fingerprints from the coffee cup matched prints from the card.

Count 2 (La Verne Burglary)

On February 9, 2007, Charles Andreu returned home to find that his residence had been burglarized. Property was missing and someone had left a handwritten note in the kitchen that said, “You should have not arrested me. I’m out. 1983.” The note had a

¹ All further statutory references are to the Penal Code, unless otherwise specified.

smiley face drawn in the corner. In the attached garage, both the passenger door and glove box of Andreu's parked car were open, and items had been moved.

Officer Shaun Dinkle of the City of La Verne Police Department lifted a fingerprint from the front passenger door of the car. Terrio compared the fingerprint lifted by Officer Dinkle to a known 10-print card from defendant. The fingerprint from the car door matched a print from the card.

Timing

On August 29, 2007, a criminal complaint was filed in Los Angeles Superior Court case number KA080251 charging defendant with the Claremont and La Verne burglaries. On August 30, 2007, a judge issued an arrest warrant for defendant. An amended complaint was filed on September 19, 2007, but the August 30, 2007 arrest warrant remained in full force and effect.

Between February 23, 2007, and December 22, 2011, defendant was continuously incarcerated in the California Department of Corrections and Rehabilitation for an offense unrelated to this case. By March 2007, law enforcement was aware that defendant had been arrested and was incarcerated in connection with the other matter. In October 2007, a detective from the Claremont Police Department interviewed defendant concerning the allegations related to the Claremont burglary while defendant was incarcerated in the West Valley Detention Center. The officer informed defendant that there was a warrant for defendant's arrest for the Claremont burglary.

Defendant was released from confinement on December 22, 2011, and law enforcement arrested him two weeks later on January 4, 2012, for residential burglary (§ 459) and receiving stolen property (§ 496) in Los Angeles County Superior Court case number KA096537. On March 2, 2012, defendant was arraigned on an information relating to counts 1 and 2 from the 2007 Claremont and La Verne burglaries. On January 29, 2013, an amended information was filed charging defendant with the four counts referenced above, and the charges alleged in case number KA096537 were consolidated

into case number KA080251 as counts 3 (residential burglary) and 4 (receiving stolen property).

On February 6, 2013, a jury convicted defendant on both counts 1 and 2, residential burglary charges (§ 459), and count 4, the receiving stolen property charge (§ 496). The jury acquitted defendant on count 3. The trial court sentenced defendant to 82 years-to-life years in state prison.²

Motion to Dismiss

Before trial, defendant filed a motion to dismiss counts 1 and 2 on federal and state constitutional due process and speedy trial grounds based on the alleged prejudicial delay in bringing him to trial. Defendant argued that the delay in bringing him to trial was prejudicial because the handwritten note left at the scene during the La Verne burglary (count 2) was subsequently destroyed by law enforcement, therefore making it impossible to conduct a handwriting analysis; defendant's ex-wife, with whom he shared a home in 2007, was unavailable and would have testified that the property found in their home that was similar to the stolen property from the Claremont burglary (count 1) was theirs and not stolen property; and the transcripts from the preliminary hearing showed faded witness memories that prevented effective cross-examination.

The prosecution opposed the motion to dismiss, in part, because defendant did not assert his speedy trial right by making a written demand on the District Attorney as required under section 1381. At the hearing on the motion to dismiss, the prosecution stipulated that defendant did not write the note related to the La Verne burglary. The prosecution also agreed to exclude from evidence the items allegedly stolen in the

² The sentence was calculated as follows: as to count 1, 25 years-to-life plus five years each for two section 667, subdivision (a)(1) serious prior felony convictions, plus one year each for two section 667.5, subdivision (b) prior prison terms; as to count 2, an identical sentence to run consecutively to count 1; and as to count 4, the upper term of three years doubled for six years, plus one year each for two section 667.5, subdivision (b) prior prison terms, to run consecutively to counts 1 and 2.

Claremont burglary, which had been seized pursuant to search warrant from the house that defendant shared with his ex-wife.

Ruling on the Motion to Dismiss

The trial court found that defendant was aware of the charges pending against him and of the warrant for his arrest when he was in custody in 2007, and that he did not properly assert his speedy trial right as required by section 1381. The court further found that because only a complaint and not an information had been filed, federal speedy trial principles did not apply. The court concluded that state law speedy trial principles applied, which required balancing the justification for the delay and the actual prejudice suffered.

The court found no justification for the delay between the filing of the complaint on counts 1 and 2 and defendant's arraignment. The court then dealt with whether the delay prejudiced defendant. The court determined that any prejudice that could have resulted from the lost handwritten note was cured by the prosecution's stipulation that defendant did not write the note. Regarding defendant's inability to locate his ex-wife, the trial court found prejudice, but ruled that the prosecution's agreement to exclude evidence found at the ex-wife's house negated that prejudice. Lastly, the court determined that the witnesses' fading memories were not prejudicial because the prosecution's case was based on physical evidence rather than on eyewitness identification. The court found that although the delay in bringing defendant to trial was not justified, the delay did not prejudice defendant due to the prosecution's concessions. Accordingly, the trial court denied defendant's motion to dismiss.

DISCUSSION

Defendant contends that the trial court erred when it allowed the prosecution to cure actual and potential prejudice caused by the delay through stipulation and exclusion

of evidence. He argues that the proper remedy upon a finding of prejudice without justification for delay was immediate dismissal, without providing the prosecution an opportunity to cure the prejudice.

Standard of Review and Applicable Law

Speedy Trial Right

The right to speedy trial under the Sixth Amendment of the federal Constitution is not triggered until a defendant is arrested or formally held to answer by the filing of an indictment or information. “[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. [¶] . . . we decline to extend that reach of the amendment to the period prior to arrest.” (*U.S. v. Marion* (1971) 404 U.S. 307, 320-321 (*Marion*)). On the other hand, “[u]nder the *state* Constitution, the filing of a felony complaint is sufficient to trigger protection of the speedy trial right. [Cal. Const., art. I § 15, cl. 1]” (*People v. Martinez* (2000) 22 Cal.4th 750, 754 (*Martinez*)). To establish a state speedy trial violation, a defendant must “affirmatively demonstrate prejudice” caused by the delay. (*Id.* at p. 755.)

Due Process

“The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant’s arrest and charging.” (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*)). A defendant who complains only of delay between the crimes and his arrest “is ‘not without recourse if the delay is unjustified and

prejudicial. “[T]he right of due process protects a criminal defendant’s interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.” [Citation.] Accordingly, “[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions.” [Citation.]’ [Citation.]” (*Ibid.*) Federal due process protects a defendant from preaccusation and pretrial delays that cause “actual prejudice in presenting his defense” and where the Government’s delay in bringing the indictment was “a deliberate device to gain an advantage over him[,]” a factor not present here. (*U.S. v. Gouveia* (1984) 467 U.S. 180, 192, citing *U.S. v. Lovasco* (1977) 431 U.S. 783, 789-790; *Marion, supra*, 404 U.S. at p. 324.)

We review a trial court’s ruling on a motion to dismiss for prejudicial prearrest delay for an abuse of discretion. (*Cowan, supra*, 50 Cal.4th at p. 431.) In ruling on a motion to dismiss for prejudicial prearrest delay, the trial court employs a three-part test. ““A defendant [must first] . . . demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court . . . balances the harm to the defendant against the justification for the delay.” [Citation.]’ [Citation.] [¶] Prejudice may be shown by “loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.” [Citations.]” (*Cowan, supra*, at p. 430.) ““Even a minimal showing of prejudice may require dismissal if the proffered justification for delay be unsubstantial.”” (*People v. Hartman* (1985) 170 Cal.App.3d 572, 582-583.) “Prejudice is a factual question to be determined by the trial court” and we defer to any underlying factual findings if supported by substantial evidence. (*People v. Hill* (1984) 37 Cal.3d 491, 499 (*Hill*), citing *People v. Cave* (1978) 81 Cal.App.3d 957, 965; *Cowan, supra*, 50 Cal.4th at p. 431; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 945 (*Shleffar*).)

Defendant Failed to Comply with Penal Code Section 1381

As a preliminary matter, section 1381 requires that the defendant “shall have delivered to . . . [the] district attorney written notice of the place of his . . . imprisonment . . . and his . . . desire to be brought to trial” (§ 1381.) If the defendant is not brought to trial within 90 days after such demand, the court “shall . . . dismiss the charge.” (*Ibid.*)

Here, defendant does not contest that he was aware of the charges pending against him since 2007. He also does not contest the trial court’s finding that he did not properly make a demand under section 1381.

Although the Attorney General argues that the trial court was permitted to deny defendant’s motion to dismiss for failure to comply with section 1381 alone, defendant correctly asserts that state constitutional and federal due process rights to a speedy trial are not dependent on compliance with section 1381. “The statutory speedy trial provisions, Penal Code sections 1381 to 1389.8, are ‘supplementary to and a construction of’ the state constitutional speedy trial guarantee. [Citations.] . . . [¶] Because the state constitutional speedy trial right is self-executing and broader than its statutory implementation, a defendant may claim a violation of the state Constitution’s speedy trial right based on delay not covered by any statutory speedy trial provision. [Citation.] Thus, a defendant charged with a felony may predicate a claimed speedy trial violation on delay occurring after the filing of the complaint and before the defendant was held to answer the charge in superior court.” (*Martinez, supra*, 22 Cal.4th at p. 766.) “[R]egardless of whether defendant’s claim is based on a [state] due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay.’ [Citation.]” (*Id.* at p. 767.)

Justification for Delay

The trial court found no justification for the delay between the filing of the complaint related to counts 1 and 2 in 2007, and defendant's arraignment in 2012. Substantial evidence supports the court's finding. Since 2007, law enforcement knew defendant was in custody while they investigated the case and a warrant had been issued for defendant's arrest. The lack of justification does not automatically require a dismissal. (*Dews v. Appellate Division of Superior Court* (2014) 223 Cal.App.4th 660, 669.)

Prejudice

As discussed, to succeed on his motion to dismiss, defendant has the burden to show prejudice caused by the delay. In its ruling on the motion to dismiss, the trial court found that prejudice in relation to count 2 "could have existed" due to the destruction of the handwritten note, but any potential prejudice was nullified by the prosecution's stipulation that defendant did not write the note. Substantial evidence supports the trial court's finding. Defendant might have suffered prejudice from the destruction of the handwritten note only if the prosecution offered it into evidence and argued that defendant wrote the note left at the crime scene. Due to the stipulation, however, the prosecution could not, and did not, make that argument. Although the prosecution introduced the handwritten note through the La Verne burglary victim's testimony, the purpose was to establish that a burglary occurred, not that defendant had written the note.

Defendant argues that "there was no point in introducing the note if [defendant] did not write it." Based on the prosecution's stipulation that defendant did not write the note, that stipulation "suggested a different perpetrator was involved [in the count 2 burglary] who had been arrested in 1983 by the . . . victim," a suggestion that favored defendant. Thus, the absence of the actual note was not prejudicial to defendant.

The trial court concluded that defendant did not suffer prejudice from the faded memories of witnesses caused by the delay. Substantial evidence supports the court's finding. The court reasoned that the details that had faded from witnesses' memories, such as whether a car door was open or when a witness entered and left a room, were not specifically relevant to any defense or to defendant in this case. The primary evidence presented by the prosecution was physical evidence, rather than eyewitness testimony. Thus, this case is distinguishable from *Hill, supra*, 37 Cal.3d at pp. 498-499, in which the prosecution based its case primarily on eyewitness testimony, and the Supreme Court affirmed dismissal due to the fading memories of those eyewitnesses.

Finally, the trial court found defendant would be prejudiced by the delay because defendant's ex-wife could not be located, she purportedly would have testified that she and defendant owned the property found in their home that was similar to the stolen property in the Claremont burglary, and she had receipts to prove they owned the property. The court concluded, however, that because the prosecution agreed to exclude the evidence of the items found at defendant's home, any such prejudice had been eliminated.

Substantial evidence supports the trial court's finding. The unavailability of defendant's ex-wife to testify would only be prejudicial if those items were admitted as evidence at trial. Although defendant claims that he was unable to defend against testimony that certain property was missing from the victims' house in the Claremont burglary, that testimony was unrelated to the ex-wife's unavailability to testify and therefore irrelevant to the issue of prejudice.

Balancing Prejudice with Justification

Defendant did not meet his initial burden of showing prejudice caused by the delay in bringing him to trial in relation to counts 1 and 2. Although the trial court initially found potential prejudice with regard to the destroyed handwritten note and actual prejudice with regard to the unavailability of defendant's ex-wife, the court ruled

that any such prejudice was obviated by the prosecution's stipulation that defendant did not write the note and the exclusion of evidence that his ex-wife's testimony would have rebutted.

Case law supports the proposition that a trial judge may employ remedies other than dismissal to nullify potential prejudice caused by pretrial delay. "Dismissal of a prosecution is not called for when a less severe remedy will afford a defendant due process and a fair trial. (See, e.g., *People v. Zamora* (1980) 28 Cal.3d 88, 99; *Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782, 787-788; *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 831.)" (*People v. Price* (1985) 165 Cal.App.3d 536, 545-546 (*Price*).) In *Price*, this court held that even if the defendant could show prejudice from loss of a tape recording of a witness's testimony due to pretrial delay, he would be entitled to no more than exclusion of the witness's contradictory testimony at trial. (*Price, supra*, at p. 545.) This court ruled that the trial court abused its discretion by dismissing the information. (*Id.* at pp. 545-546.)

In *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185, the court stated that "[a] trial court has discretion to fashion a remedy when the prosecutor's conduct has resulted in a loss of evidence favorable to the defense." In that case, the defendant claimed that he suffered prejudice due to prosecutorial delay because a witness who allegedly could have provided testimony favorable to him died. (*Id.* at pp. 1181, 1184, 1185.) The court held that the trial court abused its discretion in dismissing the action because the prejudice "could have been substantially mitigated" by instructing the jury that defendant stayed at his brother's house during a particular period of time, to which defendant's brother allegedly would have testified. (*Id.* at pp. 1184-1186.) Accordingly, in the present case, the trial court did not abuse its discretion by allowing stipulation and exclusion of evidence to cure potential and actual prejudice rather than dismissing the case.

When a "defendant fail[s] to discharge [his] burden of showing prejudice, we need not determine whether the delay in arresting [him] was justified." (*Shleffar, supra*, 178 Cal.App.3d at p. 948; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911 ["If

defendant fails to show prejudice, the court need not inquire into the justification for the delay since there is nothing to ‘weigh’ such justification against”].) Here, the trial court weighed the relevant factors in balancing justification and prejudice. Because the court’s findings are supported by substantial evidence, we conclude it did not abuse its discretion when it denied defendant’s motion to dismiss.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

MINK, J. *

* Retired judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.